87-1748

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEWSDAY, INC.,

Petitioner,

—v.—

ROBERT J. SISE, as Chief Administrative Judge of the Office of Court Administration of the State of New York, and THOMAS HENNESSEY, as the Commissioner of Jurors of the County of Suffolk,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Does the First Amendment right of access to criminal judicial proceedings require, following the conclusion of a criminal trial, that the names and addresses of jurors be made available to the public in the absence of a specific overriding interest requiring a restriction on such access?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Newsday, Inc. and the respondents Robert J. Sise, Chief Administrative Judge of the Office of Court Administration of the State of New York, and Thomas Hennessey, Commissioner of Jurors of the County of Suffolk, State of New York.

The respondents before this Court are the same as those below.

STATEMENT PURSUANT TO RULE 28.1 OF THE UNITED STATES SUPREME COURT

Petitioner Newsday, Inc. is a wholly-owned subsidiary of the Times-Mirror Company. Times-Mirror Company owns a number of other corporations engaged in publishing and related activities in the United States which have no relationship with Newsday, Inc. other than this common ownership. Newsday, Inc. will provide a list of such entities, if requested.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner Newsday, Inc. ("Newsday") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the State of New York, entered in the above-entitled proceeding on December 23, 1987.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 71 N.Y.2d 196, 524 N.Y.S.2d 35, 518 N.E.2d 930 and is reprinted in the appendix hereto, at 2a-8a, *infra*.

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 120

A.D.2d 8, 507 N.Y.S.2d 182 and is reprinted in the appendix hereto, at 9a-16a, *infra*.

The opinion of the Supreme Court of the State of New York, County of Suffolk, is unreported and is reprinted in the appendix hereto, at 17a-20a, *infra*.

JURISDICTION

The judgment of the Supreme Court of New York, Appellate Division, Second Department, was entered on October 20, 1986, affirming the Supreme Court, Suffolk County's denial of petitioner's request to obtain access to names and addresses of discharged jurors pursuant to the First Amendment to the United States Constitution. Thereafter, on December 23, 1987 the Court of Appeals of New York affirmed the refusal to grant access.

On March 7, 1988, Justice Thurgood Marshall signed an order extending the time for filing this petition for certiorari to and including April 20, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S.C.A. Const. Art. 1, Amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

On June 29, 1982, Frances Patterson, a resident of Suffolk County, Long Island, New York, was shot through a window of her home while watching television with her two children.

The police investigation of the murder ultimately led to the arrest of the victim's estranged husband, William Patterson. Newsday, the publisher of *Newsday*, a daily newspaper circulated on Long Island,[1] provided detailed and extensive coverage of the murder, the ensuing police investigation, and the resulting murder trial of Mr. Patterson in Suffolk County Supreme Court.

The jury deliberated for three days without reaching a verdict, and thus there arose the possibility of a mistrial by hung jury. During deliberations, Newsday sought to obtain the names and addresses of the *Patterson* jury so that it could contact the jurors upon the conclusion of the proceedings to determine whether they would consent to be interviewed. Consistent with the procedure it had regularly followed in successfully obtaining juror names and addresses in the past,[2] on July 2, 1984, Newsday reporter Robert Wacker made an oral request for information to both the clerk of the court and respondent

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1 Newsday also publishes *New York Newsday*, a daily newspaper distributed primarily in New York City, and *Sunday Newsday*, a Sunday newspaper distributed on Long Island and in New York City.

2 Under New York State Law, the Commissioner of Jurors is the official custodian of records relating to the administration and functioning of the jury system, and is thus required to maintain all such records under his control. N.Y. Comp. Codes R. & Regs. tit. 22, § 128.13 (1987). It is the practice in Suffolk County for the Commissioner of Jurors to prepare a list of the names and home addresses of eligible jurors for use by a judge presiding over jury selection. The names and addresses are derived from the juror qualification questionnaire sent to and prepared by citizens of voting age residing in Suffolk County. In the course of *voir dire*, the judge circles the names of prospective jurors on the judge's list who have been selected to sit on the jury. At the conclusion of jury selection, the judge's list, reflecting the names and addresses of selected jurors, as well as a duplicate list kept by the central jury room clerk, are returned to the possession of the Suffolk County Commissioner of Jurors. A trial court is not statutorily required to maintain a record of the names and addresses of the jurors chosen in a particular case, N.Y. Comp. Codes R. & Regs. tit. 22, § 104.1 (1987) and trial courts in Suffolk County do not regularly chronicle such information. Affidavit of Thomas Hennessey ¶¶ 4-7.

Thomas Hennessey, the Suffolk County Commissioner of Jurors.[3] Hennessey denied the request, referring to a then recent June 13, 1984 opinion letter rendered by counsel for the New York State Office of Court Administration which advised all Commissioners of Jurors against the release of juror names and addresses.[4] By letter dated July 3, 1984, Newsday made an identical written request for the names and addresses of the members of the *Patterson* jury pursuant to New York's Freedom of Information Law ("FOIL"). N.Y. Pub. Off. Law §§ 84-90 (McKinney 1984). In a letter dated that same day, Hennessey again denied Newsday's request without providing a substantive explanation.

On July 4, 1984, the *Patterson* case ended in a mistrial after the jury indicated that they were deadlocked and could not reach a verdict.

Meanwhile, Newsday continued its effort to obtain the names and addresses of the now-discharged *Patterson* jurors. In a letter dated August 20, 1984, Newsday's counsel submitted a third request to the Commissioner of Jurors seeking this information pursuant to FOIL. By letter dated September 13, 1984, counsel for the Office of Court Administration, responding on behalf of the Suffolk County Commissioner of Jurors, again denied Newsday's FOIL request, stating that jurors' names and addresses fell within the confidentiality provisions of New York

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3 The Suffolk County Commissioner of Jurors is both "an officer of the court" and "considered part of the judiciary." *Newsday, Inc. v. Sise*, 120 A.D.2d 8, 15, n.2, 507 N.Y.S.2d 182, 186 n.2 (2d Dep't 1986), *aff'd*, 71 N.Y.2d 196, 524 N.Y.S.2d 35, 518 N.E.2d 930 (1987).

4 It had been the regular practice of Newsday to seek the names and addresses of jurors sitting in criminal trials in Suffolk County from the Suffolk County Commissioner of Jurors. Prior to the promulgation of the June 13, 1984 letter, Newsday had not been denied access to this information. Affidavit of Richard Galant ¶ 12. Requesting jurors' names and addresses from a county's Commissioner of Jurors was apparently the regular method of obtaining this information in other counties of New York as well. *See, e.g., Herald Co. v. Roy*, 107 A.D.2d 515, 517, 487 N.Y.S.2d 435, 437 (4th Dep't 1985).

Judiciary Law Section 509(a)[5] because they are derived from completed juror qualification questionnaires which are considered confidential. As such, the letter concluded, juror names and addresses fell within the FOIL exemption for records specifically exempted from disclosure by state statute. N.Y. Pub. Off. Law § 87(2)(a) ("agency may deny access to records . . . that . . . are specifically exempted from disclosure by state or federal statute").

On November 14, 1984, Newsday commenced a proceeding in New York State Supreme Court, Suffolk County, for review of the determination of the Office of Court Administration denying access to the names and addresses of the *Patterson* jurors. Newsday premised its right to the names and addresses of jurors on three separate bases—its state statutory right under FOIL, the common law right of access to judicial records and the constitutional right of access to criminal trials accorded by the First Amendment to the United States Constitution.

On February 19, 1985, the Supreme Court, Suffolk County, dismissed Newsday's petition, finding that the names and addresses contained in the juror qualification questionnaire were statutorily protected by the confidentiality provision of § 509(a) of the New York Judiciary Law. The Court did not address Newsday's contention that it had an independent right to this information under the common law and the First Amendment. On appeal, the Appellate Division of the Supreme Court, in an opinion dated October 20, 1986, unanimously affirmed the dismissal of Newsday's petition. The Appellate Division held that Section 509(a) renders confidential all records used in the juror selection process. Alternatively, the Appellate Division held that the Commissioner of Jurors, as "an officer of the court"

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5 Judiciary Law § 509(a) provides, in pertinent part:

> The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. . . . Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division.

N.Y. Jud. Law § 509(a) (McKinney 1988).

performing an integral role in the operation of the courts, is "considered part of the judiciary" and thus not subject to the Freedom of Information Law. Like the lower court, the Appellate Division failed to address Newsday's independent contention that it had both a common law and a First Amendment right of access to juror names and addresses.

Newsday appealed to the New York Court of Appeals, arguing that § 509(a) did not prevent disclosure of jurors' names and addresses and reiterating its separate argument that, independent of and notwithstanding an adverse decision under FOIL, the public has a common law and First Amendment right of access to jurors' names and addresses which flows directly from the public's constitutional right of access to criminal trials.

The New York Court of Appeals rejected Newsday's arguments and affirmed the decision of the Appellate Division. The Court held that § 509(a) of the Judiciary Law shielded *all* information derived from the juror qualification questionnaire from disclosure regardless of whether juror privacy or safety interests were or were not threatened by disclosure of the particular information sought. As for Newsday's constitutional argument, the Court of Appeals summarily rejected Newsday's claim of a First Amendment right of access to jurors' names and addresses, concluding that "as petitioner has not contended that it has been denied access to any judicial proceedings or to any transcripts of any proceedings, petitioner's constitutional right of access has not been violated." *Newsday, Inc. v. Sise*, 71 N.Y.2d 146, 153 n.4, 524 N.Y.S.2d 35, 39 n.4, 518 N.E.2d 930, 933 n.4 (1987). The Court of Appeals likewise rejected Newsday's assertion of a common-law right of access because the jurors' names and addresses had "not been entered into evidence or filed in court." *Id.*

REASONS FOR GRANTING THE WRIT

I

THE NEW YORK COURT OF APPEALS' REJECTION OF A RIGHT OF ACCESS TO JURORS' NAMES AND ADDRESSES MISCONSTRUES THE PURPOSE BEHIND THE FIRST AMENDMENT RIGHT OF ACCESS TO CRIMINAL TRIALS, AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

A generation of Supreme Court decisions has clearly articulated the fundamental role which public access to criminal proceedings plays in the functioning of the judicial process and our government as a whole. Beginning with *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), in which this Court for the first time recognized a First Amendment right of access to criminal trials, and continuing with the Court's subsequent recognition of a right to attend the voir dire examination of prospective jurors, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press Enterprise I"), and most recently, the right to receive a transcript of a preliminary hearing, *Press-Enterprise Co. v. Superior Court*, ____ U.S. ____, 106 S. Ct. 2735 (1986) ("Press Enterprise II"), the Court has repeatedly added substance to its declaration that:

> it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.

Richmond Newspapers, 448 U.S. at 575.

Access to the criminal trial is not a constitutional end in and of itself, but rather is a means to the achievement of other ends of constitutional significance. Indeed, as this Court has recognized, the First Amendment does not expressly speak of a right of access to criminal trials. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). Yet this Court has nevertheless recognized a right of access to the criminal trial and other criminal proceedings by concluding that access to these processes advances a fundamental core purpose of the First Amendment by

promoting an informed discussion of governmental affairs. *Globe Newspaper*, 457 U.S. at 604-05. Thus, consistent with the constitutional objective underlying this Court's previous decisions recognizing a right of access to various criminal processes, the First Amendment right of access must necessarily encompass the right to acquire the information necessary to ensure an informed public discussion of the criminal process.

Lower federal and state court decisions, in accordance with the constitutional purpose of promoting informed public discussion about the criminal trial process, have accorded a First Amendment right of access to every facet of the criminal trial. *See, e.g., In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (plea and sentencing hearings); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983) (contempt hearings); *United States v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (bail hearings); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982) (pretrial suppression hearings).

In giving broad application to the First Amendment right of access, lower courts have not extended the boundaries of First Amendment doctrine; rather, they have merely added substance to this Court's declaration that the First Amendment right of access to the criminal process exists to "ensure that [the] constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper*, 457 U.S. at 604-05.

Without engaging in any First Amendment analysis, the New York Court of Appeals rejected petitioner's claim of a constitutional right of access to juror names and addresses by rigidly concluding that no First Amendment rights were infringed because Newsday was not seeking access to a judicial proceeding or transcript of a proceeding. The narrow focus of the Court of Appeals decision wholly ignores the underlying objectives which the constitutional right to attend criminal proceedings was designed to achieve. In its restrictive view of the First Amendment right—and in its resulting analysis—the Court of Appeals effectively concludes that the access question may be determined by application of a talismanic test. Numerous lower courts have rejected such a limited conception of the First

Amendment right of access, and have found a right to materials and information apart from judicial proceedings and transcripts which fundamentally relate to the criminal process. *See, e.g., In re National Broadcasting Co.*, 828 F.2d 340 (6th Cir. 1987) (documents filed in connection with proceedings relating to disqualification of judge in criminal trial); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987) (motion to suppress wiretap evidence filed under seal); *In re Washington Post Co.*, 807 F.2d 383 (affidavits relating to sentencing hearing); *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985) (bill of particulars in criminal proceedings); *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983) (pretrial documents in general in criminal case).

Moreover, the Fourth Circuit and two federal district courts have expressly recognized that a right of access attaches to the names and addresses of jurors sitting in a criminal case. In *In re Baltimore Sun Co.*, 841 F.2d 74, 14 Media L. Rep. (BNA) 2379 (4th Cir. 1988), the Fourth Circuit released the names and addresses of jurors that, as here, were contained in juror questionnaires statutorily exempted from public disclosure. *Compare* 28 U.S.C.A. § 1867(f) (West 1988) *with* N.Y. Jud. Law § 509(a) (McKinney 1988). Despite the statute, the Fourth Circuit, "draw[ing] upon the discussion of the Court relating to the jury system in [Press Enterprise I]," held that the names and addresses of jurors "are just as much a part of the public record as any other part of the case." In so ruling, the court thought it "no more than an application of what has always been the law" to order release of juror names and addresses upon the empaneling of the jury. The court cited "the risk of loss of confidence of the public in the judicial process" where a criminal defendant is "tried by a jury whose members may maintain anonymity." 841 F.2d at ____, 14 Media L. Rep. (BNA) at 2380.

Similarly, in *United States v. Doherty*, 14 Media L. Rep. (BNA) 1407 (D.C. Mass. 1987) the district court found a qualified First Amendment right to juror names and addresses in a criminal case. The court observed that it was "important for

the public to receive information about the operation of the administration of justice, including information about the actual people who do render justice in the truest sense of the word." Access to juror names and addresses would provide "an independent, non-governmental verification of the utter impartiality of the processes involved in selecting jurors and shielding them from improper influences" and would "enhance the operation of the jury system itself by educating the public as to their own duties and obligations should they be called for jury service." 14 Media L. Rep. (BNA) at 1409. Finally, in *In re New York Times Co.*, Misc. No. 82-0124 (D.D.C. June 19, 1982), the judge presiding at the trial of John Hinckley, citing *Richmond Newspapers v. Virginia*, recognized a First Amendment right of access to juror names and addresses, and released the names and addresses because of the absence of any "overriding interest."

It is thus apparent that, contrary to the decision rendered by the Court of Appeals, the constitutional rationale underlying this Court's access decisions as well as numerous rulings according access in lower courts indicate that it is not essential for purposes of First Amendment analysis whether the matter to which access is sought can be classified as a judicial proceeding. *Press Enterprise I*, 464 U.S. at 516-17 (Stevens, J., concurring). Rather, what a court faced with a First Amendment assertion of access must assess—an analysis totally overlooked by the New York Court of Appeals—is whether the same interests which led this Court to recognize a public right of access to trials, to the voir dire of jurors, and to the transcript of a preliminary hearing are also served by access to identifying information about jurors.

Juror names and addresses are important to public understanding of the criminal process and are worthy of a right of access under the First Amendment. Interviews with jurors after conclusion of their service—frequently made possible only by media access to their names and addresses—have become both a routine and integral part of American media coverage of the

criminal trial.[6] The decision of the New York Court of Appeals rejecting a right of access to jurors' names and addresses seriously infringes upon the public's ability to obtain information given voluntarily by participants in the most critical phase of a criminal judicial proceeding.

The question of whether there is a public right of access to juror names and addresses implicates the First Amendment rights of all the citizens of New York. Media organizations seeking access to jurors' names and addresses for the purpose of interviewing jurors are now forced to resort to a statute which has been found to "categorically prohibit" this very information from being disclosed. *Newsday, Inc. v. Sise*, 71 N.Y.2d at 153, 524 N.Y.S.2d at 39, 518 N.E.2d at 933. The courts of New York have thus eviscerated the First Amendment in casting an almost insurmountable burden on the public to establish why access to jurors' names and addresses should *ever* be granted. A high court decision on the question of access to jurors' names and addresses is therefore essential to preserve the public's recognized right of access to criminal proceedings.

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6 *See, e.g.*, "Jurors Describe 'Wild' Shifts Of Opinion," N.Y. Times, Mar. 26, 1988, at A36, col. 1 (jurors discuss nine days of deliberation preceding plea bargain in a publicized local murder trial); "A Jury Wrestles With Pornography," The American Lawyer, Mar. 1988, at 96 (discharged jurors discuss first federal obscenity conviction under RICO); "Howard Beach Juror Cites Victim's Fear," N.Y. Times, Dec. 27, 1987, at A38, col. 4 (jurors discuss reason behind manslaughter verdict in Howard Beach racial attack trial); "Man, Given Death For Rape, Murder, Praises Prosecutor," L.A. Times, Aug. 25, 1987, at B1, col. 5 (jurors discuss what led them to reach death verdict in penalty phase of murder trial); "Coercion Fears Linked To Mistrial In Spy Case," N.Y. Times, Nov. 8, 1985, at A20, col. 5 (jurors discuss breakdown of deliberations); "8 Who Protested South Africa Are Acquitted," N. Y. Times, May 18, 1985, at A33, col. 1 (juror discusses acquittal of defendants who occupied South African Consulate); "Jurors In Harris Trial Re-Enacted Night Of Murder," N.Y. Times, Feb. 26, 1981, at A1, col. 5 (jurors discuss what led to verdict in Jean Harris murder trial).

II

THE PRESS HAS A FIRST AMENDMENT RIGHT OF ACCESS TO THE NAMES AND ADDRESSES OF JURORS UPON THE CONCLUSION OF THEIR JURY SERVICE

The decisions of this Court prescribe a two-part test for determining whether there is a First Amendment right of access. As applied to the particular question of access to jurors' names and addresses, this test requires courts to consider: (1) whether a juror's identity and location of residence has historically been a matter of public knowledge; and (2) whether the information generated by access to jurors' names and addresses plays a significant positive role in the functioning of the judicial process and the government as a whole. *Globe Newspaper*, 457 U.S. at 605-06. This two-part analysis—which the New York Court of Appeals did not undertake—supports a constitutional right of access to juror names and addresses.

(A) Both Historical Tradition And Contemporary Practice Indicate That The Identities And Places Of Residence Of Sitting Jurors Have Routinely Been Available To The Public

Prior to the mass urban migration which commenced in the United States in the late nineteenth century, both the names and addresses of jurors were freely available to anyone who cared to know. Criminal trials were open to the public, and in most American communities, community residents knew and indeed were neighbors of every member of the jury. *In re Baltimore Sun*, 841 F.2d at ____, 14 Media L. Rep. (BNA) at 2380; *see also, Richmond Newspapers*, 448 U.S. at 568, *quoting from* Journals of the Continental Congress, 1774-1789, p. 107 (1904) (stating that jurors, being from the same neighborhood as the accused, "may reasonably be supposed to be acquainted with his character"). Even today, this remains the situation in many rural communities. *In re Baltimore Sun*, 841 F.2d at ____, 14 Media L. Rep. (BNA) at 2380.

While this Court has never addressed the question of a First Amendment right of access to jurors' names and addresses, it has suggested that at least juror names have ordinarily been available absent overriding circumstances. *See Press Enterprise I*, 464 U.S. at 512 ("a [juror's] valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the [juror] from embarrassment"). Indeed, in *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303 (1983) (opinion in chambers), Justice Brennan, sitting as Circuit Justice, stayed enforcement of an order preventing the printing or announcing of juror names and addresses in a criminal case, observing that once a criminal trial has ended, there is no "compelling interest" in restricting release of juror names and addresses. 463 U.S. at 1306-07.

Moreover, interviewing jurors after a trial to determine what led them to reach their verdict has become a commonplace occurrence throughout the United States. *See supra* n.6. In most instances, those jurors who agree to be interviewed freely allow their names to be used in the ensuing article or broadcast. Thus, both historical tradition and current practice indicate that access to the identity and place of residence of jurors has been freely available in the United States, and that through that access, a large percentage of jurors have routinely agreed to discuss their jury experience with the media.

(B) The Information Obtained Through Access To Jurors' Names And Addresses Plays A Significant Positive Role In The Functioning Of The Judicial Process And The Government As A Whole

Juror interviews, moreover, which are often made possible only if the media has access to a juror's name and address,[7] play

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7 It is the practice of many state and federal courts, after a jury has rendered its verdict in a case which has attracted significant public notoriety, to shield the just-discharged jurors from immediate face-to-

a significant positive role in the functioning of the judicial process, and indeed of the government as a whole. Juror interviews act to shed light on perhaps the most critical phase of the criminal trial, and are essential if the public is to have a full appreciation of the criminal process. *United States v. Doherty*, 14 Media L. Rep. (BNA) at 1409. Interviews with discharged jurors serve a further educative function by familiarizing the public with a proceeding in which most of them will one day be required to take part.

Post-verdict interviews, moreover, serve to assure the public that, through our judicial system, justice can and has indeed been rendered. Results alone, as this Court has recognized, do not satisfy "the natural community desire for 'satisfaction.' " *Richmond Newspapers*, 448 U.S. at 571. To inspire public confidence, justice must satisfy the appearance of justice, and the appearance of justice is simply not served if those charged with a crime may be regularly tried by juries whose members may maintain anonymity. *In re Baltimore Sun*, 841 F.2d at ____, 14 Media L. Rep. (BNA) at 2380.

The information obtained through access to jurors' names and addresses improves the quality of each particular criminal proceeding and indeed of the underlying process as a whole. While—unlike party or attorney contact with jurors—the motivation behind media contact with discharged jurors is not to flesh out information with which the verdict can be attacked, *see Journal Publishing Co. v. Mecham*, 801 F.2d 1233, 1236 (10th Cir. 1986), instances of jury irregularity are on occasion

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face media interaction by moving them through a restricted area of the courthouse, at which point they are given transportation home. *See, e.g., Doherty*, 14 Media L. Rep. (BNA) at 1409, n.4. Moreover, even in cases where discharged jurors leave the courtroom through the public exits, few newspapers in this country are able to mobilize the reporters necessary to simultaneously interview twelve jurors. Finally, in those cases which assume importance only at some point after a jury has rendered its verdict, the availability of the jurors' names and addresses is the only way in which the jurors can be contacted to be interviewed.

uncovered through media interviews with jurors. *See, e.g., United States v. Posner*, 644 F. Supp. 885, 886 n.2 (S.D. Fla. 1986) (trial court first learned that jury may have been exposed to prejudicial outside influences through newspaper article in which juror was interviewed), *aff'd without opinion sub nom. United States v. Scharrer*, 828 F.2d 773 (11th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1110 (1988).[8] Moreover, research aided by juror interviews has shed light on certain system-wide problems which have been found to adversely affect the proper functioning of our judicial system.[9]

Finally, while the modern day jury's role in the criminal process is officially limited to serving as the triers of fact in a particular trial, it is well-recognized that the jury's actual role is not nearly so limited. Through its verdict, the jury engages in subtle policymaking on questions as diverse as the point beyond which the government cannot go in inducing the commission of a

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8 Even if media exposure of improper jury conduct through juror interviews in a particular case is not of the type which may result in invalidation of the verdict, *see Tanner v. United States*, ____ U.S. ____, 107 S. Ct. 2739 (1987), exposing such misconduct may result in reforms designed to minimize the possibility of such irregularities occurring in the future. Even if no reform occurs, it is in the public interest that the community be aware of the weaknesses, as well as the strengths, of the criminal jury trial system.

9 *See, e.g.*, Note, *The Frye Doctrine & Relevancy Approach Controversy: An Empirical Evaluation*, 74 Geo. L.J. 1769, 1776, 1777 (1986) (citing conflicting studies using juror interviews on question of whether jurors overestimate the probative value of polygraph testimony); Mansfield, *Jury Notice*, 74 Geo. L.J. 395, 410 (1985) (citing study using juror interviews in support of conclusion that instructions to the jury are ineffectual in dissuading jurors from using information acquired independent of the evidence presented to reach their verdict); "Jurors In Rape Trials Studied" N.Y. Times, June 17, 1985, at C13 (findings obtained from interviews with 360 jurors who had served on juries in sexual assault prosecutions indicated that the victim's allegations were doubted if she was sexually active, or if she knew the assailant).

crime,[10] the limits of self-defense,[11] the boundaries of the defense of insanity[12] and the methods of protest which can be legally utilized by the public in demonstrating their opposition to government policies.[13]

Moreover, through the process of juror nullification, the jury has the power to ignore the law as instructed to it by the judge and to disregard even uncontradicted evidence of guilt. *United States v. Spock*, 416 F.2d 165, 180-82 (1st Cir. 1969) (defendants charged with conspiracy to interfere with the military draft); *United States v. Dougherty*, 473 F.2d 1113, 1130, 1132 (D.C. Cir. 1972) (defendants charged with illegal entry and destruction of property at the offices of Dow Chemical Com-

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10 In the trial of John Z. DeLorean, for example, DeLorean successfully asserted the defense that he would not have independently entered into the conspiracy to distribute cocaine for which he was charged if the police had not induced him to do so. Interviews with jurors after the verdict indicate that the jurors sought to send a message to the government that its actions were inappropriate. N.Y. Times, Aug. 17, 1984, at A1, col. 3.

11 Defendants charged with murdering a spouse or parent frequently raise the defense of self-defense, asserting that their actions were justified in light of prolonged exposure to physical or emotional abuse. Jurors are thus asked to decide in these cases whether and under what circumstances such conduct is justified. *See, e.g.*, "Son Acquitted Of Trying To Murder Abusive Father." L.A. Times, Oct. 11, 1986, at 1, col. 1.

12 In *In re New York Times Company*, Misc. No. 82-0124 (D.D.C. June 19, 1982) the district court found compelling the argument that it was essential that juror interviews be conducted at the end of the Hinckley trial because "publicity about the case is likely to play a large role in shaping public and legislative attitudes towards the insanity defense in the future."

13 In jury trials involving the occupation of foreign consulates, and the forcible prevention of recruiters for the Central Intelligence Agency from interviewing on college campuses, defendants have successfully asserted the defense that their otherwise illegal actions were necessary to prevent the occurrence of greater harm. "Jurors Discuss Protesters: 'They Did It For A Reason,' " Daily Hampshire Gazette, Apr. 16, 1987, at 1; "8 Who Protested South Africa Are Acquitted," N.Y. Times, May 18, 1985, at A33, col. 1.

pany). Since before the birth of our nation—in cases as varied as the trial of John Peter Zenger and prosecutions under the fugitive slave laws—juries have used this extraordinary power to acquit those charged with an offense where the jury considers the defendant's actions acceptable or condonable under the mores of the community. *See* Levine, *The Legislative Role of Juries*, 1984 Am. B. Found. Res. J. 605, 606. It is thus apparent that, far beyond simply deciding guilt or innocence in a particular case, juries frequently exercise a quasi-legislative function in matters which gravely affect the direction of our society, as well as in other cases of lesser import. It is the post-verdict juror interview which allows the public to determine what message the jury is sending through the rendering of its verdict.[14] Post-verdict juror interviews with the media, therefore, play an essential role in the public debate over issues critically germane to the criminal process and indeed to our government as a whole.

In summary, the interests which led this Court to recognize a First Amendment right of access to criminal trials, to the voir dire of jurors, and to the preliminary hearing are also promoted by access to the names and addresses of jurors. Access to juror names and addresses is consistent with and necessary to the full enjoyment of the constitutional right of access to other various components of the criminal process. The First Amendment thus grants a qualified right of access to the names and addresses of jurors sitting in criminal trials after the conclusion of their jury service at the latest.

The refusal of the New York courts to recognize this general right and accord it due weight in determining whether access should have been granted to the names and addresses of the *Patterson* jurors seriously infringed upon petitioner's general right to gather newsworthy information, *see Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972), as well as its specific right to have the opportunity to acquire information so fundamen-

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14 In the absence of post-verdict interviews, it is impossible to determine whether the verdict resulted simply from the government's inability to prove its case, or whether other factors were responsible, such as an acceptance of the defendant's conduct, or a disapproval of the government's.

tally related to the criminal process. There were no specific findings, as required by the Constitution, that overriding interests necessitated that access to the *Patterson* jurors' names and addresses be denied.[15] Nor, of course, were there any findings that alternatives to denying access could not adequately protect any interests favoring closure.[16]

What petitioner seeks is recognition of a First Amendment right of access to jurors' names and addresses which must be properly considered before such access may be denied. Newsday recognizes that the First Amendment right of access is a qualified right, and that in a given case the right of access must be balanced against any interests favoring closure. What has occurred in the New York Court of Appeals, in a ruling clearly at odds with the access decisions rendered by this Court, is the summary elimination of the First Amendment right as a factor to be determined in the balance. Plenary review of the decision of the New York Court of Appeals is thus essential.

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15 Given the nature of the *Patterson* case, finding the existence of such overriding interests would indeed have been difficult. Newsday sought the names and addresses of jurors ultimately unable to render a verdict. Thus, even if there had been threats or other indications that the safety of the jurors might be endangered—which there had not been—the jurors' failure to come to a verdict negated any such concerns.

16 Any jurors may, of course, refuse to speak to the press. Other safeguards may be put in place by a court, such as a prohibition against repeated requests for interviews, refusing to release names and addresses to anyone connected with the defendant, a commitment from the media that addresses of jurors will not be published, and statements from the bench discouraging jurors from relating the specific votes or positions taken by other jurors.

It should be noted that, in the many articles which have resulted from juror interviews with the press, jurors have shown considerable restraint in not disclosing the votes or positions taken by other jurors. *See, e.g.*, N.Y. Times, Dec. 27, 1987, at A38, col. 4 (Howard Beach jurors who agreed to be interviewed refused to disclose how many jurors had been adamant against murder convictions). The media has likewise shown restraint in not publishing the names of jurors unless they have agreed to be so identified.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel:

HARRY T. WALTERS

April 19, 1988

APPENDICES

APPENDIX A

Judgment of the Court of Appeals of the State of New York

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

2 No. 327

In the Matter of Newsday, Inc.,

Appellant,

v.

Robert J. Sise, as Chief Administrative Judge &c., et al.,

Respondents.

The appellant in the above entitled appeal appeared by Townley and Updike, Esqs.; the respondent appeared by Michael Colodner, Esq., Counsel, Office of Court Administration.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Judge Hancock. Judges Simons, Kaye, Alexander and Titone concur. Chief Judge Wachtler and Judge Bellacosa took no part.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Suffolk County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 23, 1987

APPENDIX B

Opinion of the Court of Appeals of the State of New York

In the Matter of Newsday, Inc., Appellant, v. Robert J. Sise, as Chief Administrative Judge of the Office of Court Administration of the State of New York, et al., Respondents.

Argued November 12, 1987; decided December 23, 1987

SUMMARY

APPEAL, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered October 20, 1986, which affirmed a judgment of the Supreme Court at Special Term (Lester E. Gerard, J.), entered in Suffolk County in a proceeding pursuant to CPLR article 78, dismissing the petition to compel disclosure of the names and addresses of jurors who had been selected to sit on a certain trial, without prejudice to renewal before the Appellate Division on a separate application for a court order for disclosure pursuant to Judiciary Law § 509(a).

Matter of Newsday, Inc. v. Sise, 120 AD2d 8, affirmed.

OPINION OF THE COURT

HANCOCK, JR., J

[1] Under the Freedom of Information Law (FOIL) records which have been "specifically exempted from disclosure" by other State or Federal statutes need not be made available for public inspection (Public Officers Law § 87[2][a]). Judiciary Law § 509(a) provides that the Commissioner of Jurors shall determine the qualifications of prospective jurors based, among other things, on information contained in the juror qualification questionnaires and that "[s]uch questionnaires * * * shall not be disclosed except to the county jury board or as permitted by the appellate division." The issue here is whether records

containing the names and addresses of jurors obtained from such questionnaires are within the exemption from disclosure under Judiciary Law § 509(a). For the following reasons, we hold that they are.

I

Petitioner, Newsday, Inc., is the publisher of a daily newspaper. During June and July 1984, it ran a series of articles covering the highly publicized William Patterson murder trial. During the trial Newsday made both an oral and a written request to respondent Hennessey, the Commissioner of Jurors of Suffolk County, that he provide the names and addresses of the jurors who had been selected to sit on the Patterson trial. The Commissioner refused both requests on the advice of counsel for the Office of Court Administration (OCA) that such information was outside of the scope of FOIL because it was specifically exempted from disclosure by Judiciary Law § 509(a).

A mistrial was granted in the Patterson trial when the jury was unable to reach a verdict. Newsday then filed another request for the jurors' names and home addresses, noting that it did not seek disclosure of the juror qualification questionnaires themselves, which it admitted were exempt from disclosure under FOIL, but other records maintained by the Commissioner containing the names and addresses of the jurors chosen to serve on the first Patterson trial. Newsday's request was forwarded to counsel for OCA who advised that it should be denied on, among other grounds, the specific exemption from FOIL disclosure created by the confidentiality provision in Judiciary Law § 509(a).[1]

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1 The Commissioner also cited the following three reasons for denying petitioner's request: (1) the records of the Commissioner of Jurors involving juror names and addresses are court records (*see*, Public Officers Law § 86 [3]), (2) the release of the records would constitute an unwarranted invasion of the jurors' personal privacy (*see*, Public Officers Law, § 87[2][b]), and (3) the disclosure would endanger the jurors' lives or safety (*see*, Public Officers Law § 87 [2][f]). In view of our holding, we need not address these contentions.

Upon the Commissioner's refusal to provide access to the records, Newsday commenced this CPLR article 78 proceeding to compel disclosure of them. In its petition, Newsday contended it had the right to inspect these records under FOIL, under the common-law right of access to judicial records, and under the First Amendment right of access to criminal trials. Supreme Court held that Judiciary Law § 509(a) exempts such records from disclosure and dismissed the petition without prejudice to renewal on a separate application for a court order for disclosure pursuant to Judiciary Law § 509(a).[2] The Appellate Division unanimously affirmed stating that the statute "renders confidential all records used in or generated by the juror selection process" (120 AD2d, at 12)—not merely the juror qualification questionnaires—and that to hold otherwise would defeat the statute's underlying purpose. We granted leave to appeal and now affirm the order of the Appellate Division.

II

The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy (*see*, Public Officers Law § 84; *Matter of Capital Newspapers v. Whalen*, 69 NY2d 246, 252; *Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571). To achieve this purpose, we have held "that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government" (*Matter of Capital Newspapers v. Whalen*, *supra*, at 252; *see Matter of Scott, Sardano & Pomeranz v. Records Access Officer*, 65 NY2d 294, 296-297; *Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 NY2d 557, 564).

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2 Judiciary Law § 509(a) makes specific provision for disclosure "as permitted by the appellate division". The relief sought in the CPLR article 78 proceeding here is a judgment compelling disclosure. No application has been made for a court order under Judiciary Law § 509(a).

Here, respondents rely on the exception which allows denial of access to records which are "specifically exempted from disclosure" by statute (Public Officers Law § 87 [2][a]).

Petitioner, while conceding that Judiciary Law § 509(a)[3] could, in a proper case, provide a specific exemption from FOIL disclosure under Public Officers Law § 87(2)(a), argues that the exemption is limited to the questionnaires themselves, and that Judiciary Law § 509(a) does not cover records derived from or containing the information included in the questionnaires. Thus, the question before us involves only the interpretation of Judiciary Law § 509(a) and the reach of its provision for confidentiality. If a record is within the confidentiality provision of Judiciary Law § 509(a) it is necessarily exempt under FOIL.

III

Judiciary Law § 500 states that it is this State's policy to provide all litigants with the right to trial by a jury randomly selected from a fair cross-section of the community. In order to achieve this goal, Judiciary Law article 16 creates a detailed procedure for selection of jurors which necessitates, among other things, that the Commissioner of Jurors be made privy to details of jurors' personal lives obtained through the juror qualification questionnaires (*see*, Judiciary Law § 509[a]; § 513; *People v. Guzman*, 60 NY2d 403, 414-415). Recognizing that

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3 Judiciary Law § 509(a) provides: "(a) The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. The commissioner of jurors may also consider other information including information obtained from public agencies concerning previous criminal convictions. A record of the persons who are found not qualified or disqualified or who are exempted or excused, and the reasons therefor, shall be maintained by the commissioner of jurors. The county jury board shall have the power to review any determination of the commissioner as to qualifications, disqualifications, exemptions and excuses. *Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division*" (emphasis added).

many prospective jurors would be averse to having these details made public and that disclosure could result in harassment of jurors or attempts at retribution or intimidation, the Legislature has provided that the questionnaires be kept confidential and exempt from disclosure except upon an application made pursuant to Judiciary Law § 509(a).

While Judiciary Law § 509(a) refers only to the juror qualification questionnaires, its obvious purpose is to provide a cloak of confidentiality for the *information* which the questionnaires contain. It is the knowledge about the jurors—the private details obtained from the questionnaires concerning their spouses' names, the names and ages of their children, their home telephone numbers, occupations, educational backgrounds, and criminal records, if any—which the statute is designed to protect from public disclosure (*see*, *Matter of Herald Co. v. Roy*, 107 AD2d 515, 520; *see also*, *People v. Perkins*, 125 AD2d 816, 817-818). Petitioner's interpretation—that the statute exempts from disclosure only the actual questionnaires—could not have been intended. It is the information from the questionnaires, not the forms themselves which, if made public, could invade the jurors' privacy interests or threaten their safety and that information, therefore was made confidential. Because petitioner's proposed construction would defeat the very purpose of the statute and render it ineffective it must be rejected (*see*, McKinney's Cons Laws of NY, Book 1, Statutes §§ 92, 96, 144). We hold, then, that Judiciary Law § 509(a) shields from disclosure not only the juror qualification questionnaires but also those portions of other records containing information obtained from the questionnaires.

Petitioner contends that even if Judiciary Law § 509(a) is read to protect records derived or containing information from the juror qualification questionnaires, the statute should not be construed to protect the information sought here—the jurors' names and addresses—because release of such information would not invade the jurors' privacy interests or threaten their safety. The statute, itself, when read in the light of what we find to be its underlying purpose shows the argument to be without merit. In enacting Judiciary Law § 509(a), the Legislature ex-

empted *all* information contained in the questionnaires regardless of its nature and the possible effect on privacy or safety interests which disclosure might cause. The Legislature has permitted an application for a court order, upon a proper showing, that particular information contained in the questionnaires should be made public. To what extent disclosure of specified information might affect jurors' privacy and safety interests is a factor that the court must balance against the interests favoring disclosure in determining whether to grant a Judiciary Law § 509(a) application (*see*, *People v. Guzman*, *supra*, at 415). Such considerations, however are not relevant to the legal questions here: the interpretation of Judiciary Law § 509(a) and the meaning and effect to be given its confidentiality provision.

[2] Finally, petitioner argues that because the names and addresses have already been made public during voir dire, granting their release in this petition could result in no further invasion of their privacy interests. From the record, however, it clearly appears that, in voir dire, the home addresses of the jurors were not disclosed—only the general area where they lived (*see also*, *Matter of Herald Co. v. Roy*, 107 AD2d 515, 518, *supra*). Moreover, that some of the information sought may have been orally revealed during the jury selection process, cannot alter the effect of Judiciary Law § 509(a) in categorically prohibiting the public disclosure of any records containing information obtained from the juror questionnaires.[4]

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4 [2] We also reject petitioner's assertion that it is entitled to the jurors' names and addresses under the public's constitutional right of access to criminal proceedings and under the common-law right of access to judicial records. Inasmuch as petitioner has not contended that it has been denied access to any judicial proceedings, or to any transcripts of any proceedings, petitioner's constitutional right of access has not been violated (*see Matter of Herald Co. v. Roy*, 107 AD2d 515, 517; *United States v. Beckham*, 789 F2d 401, 406-409 [6th Cir.]; *United States v. Yonkers Bd. of Educ.*, 747 F2d 111, 112-114 [2nd Cir.]; *cf.*, *Matter of Associated Press v. Bell*, 70 NY2d 32; *Press-Enterprises Co. v. Superior Ct.*, 464 US 501). In addition, petitioner has no common-law right of access where records, such as these, have not been entered into evidence or filed in court and are, therefore, not public judicial records (*see*, *United States v. Beckham*, *supra*; *United States v. Gurney*, 558 F2d 1202 [5th Cir.]; *cf.*, *Bank of Am. Natl. Trust & Sav. Assn. v. Hotel Rittenhouse Assocs.*, 800 F2d 339, 343 [3d Cir.]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges SIMONS, KAYE, ALEXANDER and TITONE concur; Chief Judge WACHTLER and Judge BELLACOSA taking no part.

Order affirmed, with costs.

APPENDIX C

Opinion of the New York Supreme Court, Appellate Division, Second Department

In the Matter of NEWSDAY, INC., Appellant v. ROBERT J. SISE, as Chief Administrative Judge of the Office of Court Administration of the State of New York, et al., Respondents.

Second Department, October 20, 1986

OPINION OF THE COURT

EIBER, J.

[1] In this CPLR article 78 proceeding, we are called upon to determine whether the petitioner, the publisher of a daily newspaper, may, pursuant to the provisions of the Freedom of Information Law (hereinafter FOIL) (Public Officers Law art 6) compel the Commissioner of Jurors to disclose the names and addresses of those persons selected and sworn to serve as jurors on a highly publicized murder trial. A second and related issue which we are asked to consider is whether Judiciary Law § 509(a)[1] protects from unrestricted disclosure information that is contained in the records utilized in or generated by the juror selection process. Based upon our review of the relevant statutes and ever mindful of the policy concerns engendered by this case, we conclude that the information sought by the petitioner comes within the orbit of the confidentiality requirements of

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1 Judiciary Law § 509(a) reads as follows: "The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. The commissioner of jurors may also consider other information including information obtained from public agencies concerning previous criminal convictions. A record of the persons who are found not qualified or disqualified or who are exempted or excused, and the reasons therefor, shall be maintained by the commissioner of jurors. The county jury board shall have the power to review any determination of the commissioner as to qualifications, disqualifications, exemptions and excuses. Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division".

the Judiciary Law and is, therefore, statutorily exempt from disclosure under the provisions of FOIL. Accordingly, the judgment appealed from should be affirmed.

Throughout June and July of 1984, the petitioner, Newsday, Inc., the publisher of a daily newspaper which is distributed primarily on Long Island, covered, in a series of detailed articles, the murder trial of one William Patterson. Mr. Patterson was alleged to have murdered his estranged wife, a Suffolk County resident, by shooting her through a window of her home.

On July 3, 1984, after the Patterson jury had commenced deliberations, a Newsday reporter who had been covering the trial wrote to the Commissioner of Jurors of Suffolk County requesting that the Commissioner provide him with the names and addresses of the jurors who had been selected to sit on the case. Evidently, a similar oral request had previously been denied. The Commissioner, acting upon the advice of counsel for the Office of Court Administration (hereinafter OCA), refused to release the information sought, absent a court order. It appears that the predicate for this decision was a directive issued by counsel for OCA in response to a similar but unrelated request, which stated, in essence, that the names and home addresses of jurors are derived from confidential juror questionnaires and, therefore, pursuant to Judiciary Law § 509(a), would require judicial authorization as a precondition to release.

On July 4, 1984, the Justice presiding at the Patterson trial was compelled to declare a mistrial by reason of the jury's apparent inability to reach a verdict. Newsday's desire to gain access to the jurors was evidently intensified by the declaration of a mistrial, for, on August 20, 1984, counsel for Newsday, under the aegis of the provisions of FOIL filed a formal request for access to the records or lists maintained by the Commissioner which contained the names and home addresses of the jurors impaneled to serve on the Patterson murder trial.

In his written request, the petitioner's counsel asserted that the information sought by Newsday did not come within the purview of Judiciary Law § 509(a) and that the confidentiality requirement of this statute was limited to information of a per-

sonal nature. Disclosure of the names and home addresses of the jurors, he argued, would not impair or comprise the objectives of the statute, since the same information could be derived from other sources, such as the responses of prospective jurors during voir dire.

While accepting the premise that Judiciary Law § 509(a) was enacted to insure and preserve the confidentiality of juror records and that the statute did, in fact, constitute a lawful legislative restraint upon unqualified public access to the actual questionnaires, the petitioner's counsel, nevertheless, vigorously maintained that disclosure of the nonconfidential aspects of these records was not only permitted by the Judiciary Law, but mandated by the "presumption of access afforded by the New York Freedom of Information Law".

The foregoing request was subsequently referred by the Commissioner of Jurors to counsel for OCA. By letter dated September 13, 1984, OCA's counsel denied the request citing four principal reasons, to wit: that the records sought were, in fact, court records and, therefore, exempted from the mandates of FOIL; that the records were, in any event, protected from disclosure by Judiciary Law § 509(a); that an unwarranted invasion of privacy would result from the release of the jurors' names and home addresses; and, finally, that the disclosure of the requested information might endanger the lives or safety of these jurors. OCA's counsel further noted that, contrary to the assertions of the petitioner's attorney, jurors in Suffolk County were not required to disclose their actual home addresses during voir dire, but were merely asked to provide a general description of the vicinity in which they resided. Hence, the information sought could not be obtained in the manner suggested by the petitioner's counsel.

Undaunted by the repeated refusal to release the names and addresses of the Patterson jurors, the petitioner commenced this CPLR article 78 proceeding to compel disclosure in accordance with its request. In support of the petition, Newsday emphasized, once again, that it had no interest in obtaining personal or confidential information; it simply wanted names and addresses. Entitlement to this information was predicated

on the following grounds: FOIL's mandate of open and broad public disclosure of records of government, the common-law right of access to judicial records, and a similar right derived from U.S. Constitution 1st Amendment.

Special Term, satisfied that the protections of the Judiciary Law extended to all records utilized in evaluating the qualifications of prospective jurors, dismissed the proceeding without prejudice to renewal before this court. We agree that Judiciary Law § 509(a) renders confidential all records used in or generated by the juror selection process, including the names and addresses of prospective jurors which are derived therefrom. Moreover, in light of this specific statutory prohibition against disclosure, we find that the petitioner's attempt to procure such information by the invocation of the provisions of FOIL is unavailing.

FOIL was enacted to provide access to records of government and "proceeds under the premise that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government" (*see, Matter of Fink v. Lefkowitz*, 47 NY2d 567, 571). The Legislature, however, sensitive to the potentially competing demands and interests within and among the various sectors of society, and, cognizant of the need to keep confidential certain information necessary to the proper functioning of our democratic system, promulgated eight specific categories of exemptions to the disclosure requirements of FOIL. Under the mandate of this statute, all records of an agency are presumptively available for public inspection, unless they fall within one of these categories of exemptions (*see, Matter of Scott, Sardano & Pomeranz v. Records Access Officer of City of Syracuse*, 65 NY2d 294, 296; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp.*, 62 NY2d 75, 79-80). Principal among these exceptions is one which provides that an agency may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute" (*see*, Public Officers Law § 87[2][a]).

Such an exception is directly applicable to the matter under review, by virtue of Judiciary Law § 509(a). This provision shields from public scrutiny and renders confidential all records

and questionnaires utilized in the juror selection process. Judiciary Law § 509(a), in broad and unequivocal terms, provides, in pertinent part, that "[s]uch questionnaires and records * * * shall not be disclosed except to the county jury board or as permitted by the appellate division". Thus, the limited circumstances when information about a prospective juror may be disclosed and to whom it may be disclosed, rests in the sound discretion of the Appellate Division. For this reason, the proper procedure for obtaining access to information contained in juror records is by way of application to the Appellate Division (*see*, *People v. Guzman*, 60 NY2d 403, 414-415, cert. denied 466 US 951; *People v. Heisler*, 84 AD2d 848).

There are legitimate policy concerns underlying this statutory proscription against disclosure. The requirement of confidentiality of Judiciary Law § 509(a) operates to protect the interests of prospective jurors by prohibiting unrestricted disclosure of these records, and, by necessary implication, of the information contained in these records or derived therefrom. The questionnaires and other related records contain many details of a juror's private life (*see*, *People v. Guzman*, *supra*). By requiring that the information remain confidential, the statute encourages truthfulness in responses by prospective jurors, shields them from possible harassment and intimidation, protects them from unwarranted invasions of privacy, prevents retribution and, generally, enables jurors to discharge their solemn civic duty to pass fairly upon the matters which they are entrusted to decide. The integrity of our jury system is, in large part, dependent upon the vitality of these principles and the promotion of these laudatory objectives (*see*, *United States v. Barnes*, 604 F2d 121, 140-141, cert denied 446 US 907; *United States v. Gibbons*, 602 F2d 1044, 1050-1052, cert denied 444 US 950; *People v. DeLucia*, 15 NY2d 294, cert denied 382 US 821, on rearg 20 NY2d 275; *People v. Foti*, 99 AD2d 517).

While we are sensitive to the needs of the media, as well as the broad constitutional protections afforded to those engaged in publishing, gathering and disseminating newsworthy information, the petition's interest in ascertaining the identity of those selected to serve as jurors on a particular case is greatly out-

weighed by the privacy interests of these jurors, especially in the face of a clear expression of legislative intent that these privacy interests be respected and that the information which has been deemed "confidential" be protected from indiscriminate public disclosure (*see*, *Kuzma v. Internal Revenue Serv.*, 775 F2d 66). Moreover, it is also of significance that disclosure can be accomplished in a manner that will not offend the confidentiality requirement of the statute, since there is nothing in Judiciary Law § 509(a) which precludes the petitioner from securing the information sought, by use of an alternative means. Indeed, the statute itself explicitly sanctions the use of an alternative procedure, i.e., by providing that the information may be obtained by way of a direct application to the Appellate Division. Thus, "the public interest in disclosure can be fully satisfied without risk to the public interest in nondisclosure" (*see*, *Matter of New York News [Ventura]*, 67 NY2d 472, 477).

While the petitioner acknowledges, in principle, these fundamental tenets, it, nevertheless, argues that the plain language of the statute operates to protect only the records and questionnaires themselves, but does not render names and addresses confidential, which information is initially obtained from various public records and sources, well before the juror questionnaires are ever distributed or evaluated.

A similar argument was advanced in *Matter of Herald Co. v. Roy* (107 AD2d 515, appeal dismissed 65 NY2d 922). There, the petitioner, a Syracuse newspaper publisher, sought the names and addresses of jurors selected to serve at a pending murder trial. As in the instant case, the Commissioner of Jurors denied the request, citing the OCA directive which, apparently, was the exact letter used to justify the determination herein. The Appellate Division, Fourth Department, dismissed the proceeding on procedural grounds not relevant here. However, recognizing that the issues might arise at some future date, the court considered it appropriate to construe Judiciary Law § 509(a). In so doing, it wrote: "The term 'questionnaires' can have only one meaning and obviously it refers to the juror qualification questionnaire described in section 509(a), the form of which is prescribed by statute (Judiciary Law § 513) along with the

information contained therein. There can be no doubt that not only are the questionnaires per se confidential but that the cloak of confidentiality attaches to records in the possession of the Commissioner derived from such 'questionnaires and records' (*see*, *People v. Guzman*, 60 NY2d 403, 414-415). 'Statutes will not be construed as to render them ineffective' (McKinney's Cons Laws of NY, book 1, Statutes § 144). The Legislature certainly intended that the protection offered by this section extend to the information contained in such 'questionnaires and records' and to records maintained by the Commissioner to which such information may be transposed'' (*Matter of Herald Co. v. Roy*, *supra*, at p. 520). We concur in the foregoing reasoning. To permit the petitioner to have access to the information derived from records which, by statute, have been deemed confidential, would defeat the fundamental and salutary public purpose underlying its enactment and would effectively render its mandate substantially meaningless. The statute was enacted to protect the privacy interests of jurors as well as to prevent the risks and dangers inherent in unrestricted disclosure from coming to fruition. The potential for transgression of these protections is just as real whether the names and addresses are obtained directly from juror questionnaires or are disclosed by court personnel from other documents onto which this information may have been transposed.

[1,2] In conclusion, inasmuch as FOIL specifically exempts from the wealth of material discoverable thereunder, information which is deemed confidential under any existing statute (*see*, Public Officers Law § 87 [2][a]), and, having determined that disclosure sought in the manner pursued by the petitioner is barred by the confidentiality requirements of Judiciary Law § 509(a), the petitioner's efforts to compel the Commissioner of Jurors to release the information specified in its petition must

be rejected.[2] We note, however, that our decision in no way precludes the petitioner from utilizing the available statutory procedure for obtaining the information sought and we express no opinion as to whether any direct application made to this court, pursuant to Judiciary Law § 509(a), would be granted in the event the petitioner were to decide to pursue this course of action.

Accordingly, the judgment of Special Term should be affirmed.

NIEHOFF, J.P., LAWRENCE and KOOPER, JJ., concur.

Ordered that the judgment of the Supreme Court, Suffolk County, dated February 19, 1985, is affirmed, with costs.

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[2] Assuming, for the sake of argument, that the names and addresses of jurors do not come within the ambit of Judiciary Law § 509(a), the petitioner would, nonetheless, be incapable of compelling the Commissioner of Jurors to release this information. The Commissioner of Jurors is considered an officer of the court and performs services according to rules prescribed by the Appellate Division, which services are an integral part of the operation of the courts. The Commissioner is, therefore, considered part of the judiciary and is not subject to the Freedom of Information Law (Public Officers Law § 86; cf. *Matter of Pasik v. State Bd. of Law Examiners*, 102 AD2d 395).

APPENDIX D

Memorandum of the New York Supreme Court, Special Term

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM, PART I

NEWSDAY, INC.,

Petitioner,

—against—

ROBERT J. SISE, et al.

Respondents.

MEMORANDUM

Petition is dismissed without prejudice to renew before the Appellate Division, Second Department.

This petition requests that the Court grant a judgment in its favor pursuant to Article 78 of the CPLR directing the respondents to make available for inspection and copying the names and addresses of those jurors empaneled to hear the case of *People v. William Patterson*. This criminal proceeding, which ended in a mistrial on July 4, 1984, was tried in the Suffolk County Court before Judge Stuart Namm.

On July 3, 1984, the petitioner, Newsday, Inc., through its reporter, Robert Wacker, wrote to Thomas Hennessey, the Commissioner of Jurors for the County of Suffolk, requesting the names and addresses of the aforementioned jurors. This request was rejected by the respondent Commissioner based upon advice of counsel for the Office of Court Administration. Specifically, the Commissioner stated that he would not release the information without a Court Order. On August 20, 1984, the petitioner's attorney made a second request to the respondent Commissioner for the names and addresses of the jurors in the *People v. William Patterson* trial. This correspondence was for-

warded to the Office of Counsel of the Office of Court Administration at 270 Broadway, New York, New York, on August 22, 1984. By letter dated September 13, 1984, the request was again denied citing the following reasons:

"1) Records of the Commissioner of Jurors reflecting the names and addresses of jurors who served on a particular case are deemed to be court records. As such they are not subject to disclosure under the Freedom of Information Law. (See, Public Officers Law 8613)

2) Even if these records were subject to the Freedom of Information Law, such records are protected from disclosure because:

(a) they are specifically exempted from disclosure by state statute (see Public Officers Law 87(2)(a)). Judiciary Law Section 509(a) provides that questionnaires filled out by prospective jurors shall be kept confidential and shall not be disclosed except as permitted by the Appellate Division. In as much as the names and addresses of jurors are included in such questionnaires, they are protected by Judiciary Law Section 509(a) from disclosure, absent a Court Order;

(b) an unwarranted invasion of juror's personal privacy, as defined in Public Officers Law Section 89(2)(b) would result from the release of their names and addresses (see, Public Officers Law Section 87(2)(b));

(c) the disclosure of juror's names and addresses might endanger their lives or safety (Public Officers Law 87(2)(f))."

It is from this determination that petitioner seeks judicial relief.

Petitioner basically contends that the information requested is not protected by the confidentiality provisions of Judiciary Law 509(a) and should be made available pursuant to the New York Freedom of Information Law ("Foil"). (New York Public Officers Law Section 84 *et seq.* (1984)).

Pursuant to Judiciary Law 509(a):

> "The Commissioner of Jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. The commissioner of jurors may also consider including information obtained from public agencies concerning previous criminal convictions. A record of the persons who are found not qualified or disqualified or who are exempted or excused and the reasons therefor shall be maintained by the commissioner of jurors. The county jury board shall have the power to review any determination of the commissioner as to qualifications, disqualifications, exemptions and excuses. *Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division.*" (Emphasis added)

The Court is satisfied that the statute's confidentiality protection extends to all the records in the possession of the respondent Commissioner that are utilized in the process of evaluating a prospective juror's qualifications to serve on either the Grand Jury or Petit Jury and is not limited to the questionnaire. It is also clear from the terms of the statute that the only forum available to obtain disclosure of information in the possession of the respondent Commissioner is the Appellate Division. This ruling is implicitly substantiated by the Court of Appeals in *People v. Gusman*, 60 N.Y.S. 403, 469 N.Y.S.2d 916, 457 N.E.2d 1143 (1983). One of the issues reviewed in that case concerned an application by the defendants in *People v. Best* to the Appellate Division, Second Department, for an order permitting counsel for the defendants to inspect or copy "(a) the annual list of grand jurors for 1978; (b) the record of reasons persons selected for the Grand Jury list of 1978 were excused, exempted or disqualified; and (c) the record of age or date of birth of persons on the annual Grand Jury lists for the years 1970 through 1978; and (2) for an order directing the Clerk of Kings County to permit counsel for the defendants or other employees of the Legal Aid Society to inspect and copy informa-

tion from the questionnaires filled out by persons on the annual Grand Jury lists for the years 1970 through 1978." (For the purpose of this proceeding the Court considers the Grand Jury and the Petit Jury to be synonymous entities). The Appellate Division granted the order only to the extent of permitting counsel for the defendants to inspect, copy or reproduce the annual list of Grand Jurors for 1978. In its ruling affirming the order of the Appellate Division, the Court noted that defendant Best had made a third request for the above information. The Court resolved that since this third request was presented to the Trial Court and not to the Appellate Division (the proper forum pursuant to the terms of Judiciary Law 509(a)), the issue was not preserved for review.

The Legislature has provided a statutory forum for a review of the request for the information sought herein by way of an application to the Appellate Division. It is apparent that the aforementioned judicial body has been given exclusive authority to resolve the issues raised in the papers herein.

Therefore, the Court will dismiss the petition without prejudice to renew before the Appellate Division, Second Department.

_____

J.S.C.

No. 87-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEWSDAY, INC.,

Petitioner,

—against—

ROBERT J. SISE, as Chief Administrative Judge of the Office of Court Administration of the State of New York, and THOMAS HENNESSEY, as the Commissioner of Jurors of the County of Suffolk,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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May 20, 1988

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

This proceeding involves a petition for a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, dated December 23, 1987, which affirmed an order of the New York State Supreme Court, Appellate Division, Second Department, dated October 20, 1986. The Appellate Division's order had affirmed a judgment of the New York State Supreme Court, Suffolk County, dated February 19, 1985, which dismissed a petition for a judgment directing respondents to grant petitioner access to jurors' names and home addresses, without prejudice to petitioner's right to apply to the Appellate Division for such access pursuant to section 509(a) of the New York Judiciary Law.

Petitioner claims that certiorari should be granted because the New York Court of Appeals' ruling has violated its alleged First Amendment right of access to jurors' names and home addresses. Respondents assert that no constitutional question of substance is raised by the Court of Appeals' decision, because that decision did not determine petitioner's ultimate entitlement to jurors' names and home addresses under the First Amendment or otherwise, but only held that petitioner must comply with the procedure provided by New York law for obtaining access to juror information.

FACTS

In July of 1984, petitioner asked respondent Hennessey, the Suffolk County Commissioner of Jurors, for the names and home addresses of jurors who sat on the case of *People* v. *Patterson*, which ended in a mistrial. Respondent declined to release such information on the ground that its disclosure is governed by section 509(a) of the New York Judiciary Law, which provides that juror questionnaires and records are confidential and may not be disclosed except as permitted by the Appellate Division of the New York State Supreme Court[1].

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1 Section 509(a) of the New York Judiciary Law reads as follows:

> The commissioner of jurors shall determine the qualifications of a prospective juror on the basis of information provided on the juror's qualification questionnaire. The commissioner of jurors may also consider other information including information obtained from public agencies concerning previous criminal convictions. A record of the persons who are found not qualified or disqualified or who are exempted or excused, and the reasons therefor, shall be maintained by the commissioner of jurors. The county jury board shall have the power to review any determination of the commissioner as to qualifications, disqualifications, exemptions and excuses. Such questionnaires and records shall be considered confidential and shall not be disclosed except to the county jury board or as permitted by the appellate division.

Petitioner then brought a proceeding in the trial-level New York State Supreme Court to compel respondents to disclose to it the names and home addresses of the *Patterson* jurors. Petitioner claimed that it was entitled to this information under New York's Freedom of Information Law (N.Y. Pub. Off. Law, § 84, *et seq.*), the common law right of access to judicial records and the First Amendment right of access to criminal trials. Respondents argued in opposition that the confidentiality provisions of section 509(a) of the Judiciary Law extend to all records used in or generated by the juror selection process, including records of jurors' names and home addresses that are derived from confidential juror questionnaires. Respondent asserted that because the records sought by petitioner are protected by section 509(a), they fall within the statutory exemption exception to the disclosure requirements of the Freedom of Information Law (N.Y. Pub. Off. Law, § 87(2)(a)).

The New York Supreme Court agreed with respondents' construction of section 509(a). Observing that "[t]he Legislature has provided a statutory forum for a review of the request for the information sought herein by way of an application to the Appellate Division [which] has been given exclusive authority to resolve the issues raised in the papers herein,"[2] the Supreme Court dismissed the petition without prejudice to its renewal before the Appellate Division. The Supreme Court did not pass on petitioner's common law or constitutional claims.

The New York Supreme Court, Appellate Division, Second Department, affirmed the Supreme Court's holding that jurors' names and home addresses are protected by section 509(a) and therefore are exempt from disclosure under the Freedom of Information Law. The Court held that pursuant to section 509(a), "the limited circumstances when information about a prospective juror may be disclosed and to whom it may be disclosed, rests in the sound discretion of the Appellate Division. For this reason, the proper procedure for obtaining access to information contained in juror records is by way of application to the

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2 Appendix D to the Petition for a Writ of Certiorari (hereinafter referred to as "Petition"), at 20a.

Appellate Division." *Newsday, Inc.* v. *Sise*, 120 A.D.2d 8, 12-13, 507 N.Y.S.2d 182, 184 (2d Dept. 1986) (citations omitted).

The Appellate Division noted that there are legitimate policy concerns underlying the statutory proscription against disclosure of juror information:

> The requirement of confidentiality of Judiciary Law § 509(a) operates to protect the interests of prospective jurors by prohibiting unrestricted disclosure of these records, and, by necessary implication, of the information contained in these records or derived therefrom. The questionnaires and other related records contain many details of a juror's private life. By requiring that the information remain confidential, the statute encourages truthfulness in responses by prospective jurors, shields them from possible harassment and intimidation, protects them from unwarranted invasions of privacy, prevents retribution and, generally, enables jurors to discharge their solemn civic duty to pass fairly upon the matters which they are entrusted to decide. The integrity of our jury system is, in large part, dependent upon the vitality of these principles and the promotion of these laudatory objectives.

120 A.D.2d at 13, 507 N.Y.S.2d at 184-185 (citations omitted).

While not dealing directly with petitioner's constitutional claim, the Appellate Division found that the alternative means for obtaining disclosure of juror information explicitly sanctioned by section 509(a) assures that "the public interest in disclosure can be fully satisfied without risk to the public interest in nondisclosure." 120 A.D.2d at 13-14, 507 N.Y.S.2d at 185. The Court noted that its decision in no way precluded petitioner from making a direct application to the Appellate Division pursuant to section 509(a) for the information sought and expressed no opinion whether such an application would be granted. 120 A.D.2d at 15, 507 N.Y.S.2d at 186.

The New York Court of Appeals affirmed the Appellate Division's order. Stating that "[t]he issue here is whether records containing the names and addresses of jurors . . . are within

the exemption from disclosure under Judiciary Law § 509(a)" and that "the question before us involves only the interpretation of Judiciary Law § 509(a) and the reach of its provision for confidentiality," the Court construed section 509(a) as shielding from disclosure not only juror qualification questionnaires but also those portions of other records containing information obtained from the questionnaires. *Newsday, Inc.* v. *Sise*, 71 N.Y.2d 146, 149, 151-152, 524 N.Y.S.2d 35, 36, 38, 518 N.E.2d 930, 931-933 (1987).

One of the arguments advanced by petitioner to the Court of Appeals in support of its construction of section 509(a) was that release of jurors' names and home addresses would not threaten jurors' safety or privacy interests. The Court observed that this argument was irrelevant to the issue before it, saying:

> In enacting Judiciary Law § 509(a), the Legislature exempted *all* information contained in the questionnaires regardless of its nature and the possible effect on privacy or safety interests which disclosure might cause. The Legislature has permitted an application for a court order, upon a proper showing, that particular information contained in the questionnaires should be made public. To what extent disclosure of specified information might affect jurors' privacy and safety interests is a factor that the court must balance against the interests favoring disclosure in determining whether to grant a Judiciary Law § 509(a) application. Such considerations, however, are not relevant to the legal questions here: the interpretation of Judiciary Law § 509(a) and the meaning and effect to be given its confidentiality provision.

71 N.Y.2d at 152-153, 524 N.Y.S.2d at 38-39, 518 N.E.2d at 933 (citations omitted).

The only discussion of petitioner's constitutional claim is found in footnote four to the Court of Appeals' decision, which states:

> We also reject petitioner's assertion that it is entitled to the jurors' names and addresses under the public's consti-

tutional right of access to criminal proceedings and under the common-law right of access to judicial records. Inasmuch as petitioner has not contended that it has been denied access to any judicial proceedings or to any transcripts of any proceedings, petitioner's constitutional right of access has not been violated (*see*, *Matter of Herald Co. v Roy*, 107 AD2d 515, 517; *United States v Beckham*, 789 F2d 401, 406-409 [6th Cir.]; *United States v Yonkers Bd. of Educ.*, 747 F2d 111, 112-114 [2nd Cir.]; *cf.*, *Matter of Associated Press v Bell*, 70 NY2d 32; *Press-Enterprise Co. v Superior Ct.*, 464 US 501). In addition, petitioner has no common-law right of access where records, such as these, have not been entered into evidence or filed in court and are, therefore, not public judicial records (*see*, *United States v Beckham*, *supra*; *United States v Gurney*, 558 F2d 1202 [5th Cir.]; *cf.*, *Bank of Am. Natl. Trust & Sav. Assn.* v. *Hotel Rittenhouse Assocs.*, 800 F2d 339, 343 [3d Cir.]).

71 N.Y.2d at 153, n. 4, 524 N.Y.S.2d at 39, n. 4, 518 N.E.2d at 933, n. 4.

ARGUMENT

I.

NO SUBSTANTIAL CONSTITUTIONAL ISSUE IS RAISED BY THE NEW YORK COURT OF APPEALS' HOLDING THAT PETITIONER IS REQUIRED TO COMPLY WITH THE PROCEDURE PROVIDED BY NEW YORK LAW FOR OBTAINING ACCESS TO JUROR INFORMATION

Petitioner argues that certiorari should be granted to review the New York Court of Appeals' "summary elimination of the First Amendment right as a factor to be determined" in balancing the interests favoring and opposing a right of access to jurors' names and home addresses (Petition, at 18). This characterization of the Court of Appeals' decision is absurd. As repeatedly stated by that Court, the sole question for its consideration was whether the confidentiality provisions of section 509(a) apply to jurors' names and home addresses. 71 N.Y.2d

at 151-153, 524 N.Y.S.2d at 36-38, 518 N.E.2d at 931-932. The Court expressly declined to engage in a First Amendment-type balancing of the interests favoring and opposing disclosure of the information sought by petitioner, noting that these factors must be weighed in determining whether to grant a section 509(a) application, but were not relevant to the legal issue before the Court of Appeals. 71 N.Y.2d at 152-153, 524 N.Y.S.2d at 38-39, 518 N.E.2d at 933. The only question decided by the Court thus was whether petitioner was required to apply to the Appellate Division for disclosure of jurors' names and home addresses; the Court offered no view whatsoever whether petitioner should be permitted access to such names and addresses under the First Amendment, or otherwise.

The restricted nature of the Court of Appeals' ruling is not altered by footnote 4 of its opinion, rejecting petitioner's claim that it is entitled to disclosure of jurors' names and home addresses pursuant to the First Amendment right of access to criminal proceedings. At most, this was a rejection of the claim that petitioner has a First Amendment right to *unrestricted* access to juror information—an argument that petitioner does not advance in support of its petition for a writ of certiorari. *See* Petition, at 18 (acknowledging that the claimed First Amendment right of access to jurors' names and home addresses is a qualified right). Given the Court of Appeals' statement that the only issue it was determining was whether the section 509(a) procedure must be used to obtain disclosure of jurors' names and home addresses, it is clear that the Court held only that any First Amendment balancing test for access to such information may be applied by the Appellate Division when an appropriate request is made to that body pursuant to section 509(a).

Thus, contrary to petitioner's contention, the Court of Appeals has not precluded petitioner from asserting any claimed First Amendment right of access to jurors' names and home addresses; it merely has held that under section 509(a), it is for the Appellate Division to pass on any such claim. Unless and until the Appellate Division rejects an application for disclosure of jurors' names and home addresses pursuant to that section, petitioner's assertion that its constitutional right of access has

been denied is premature. This Court accordingly should deny the petition for a writ of certiorari, on the ground that no constitutional issue is presented by the Court of Appeals' holding that petitioner is required to comply with the procedure provided by New York law for obtaining access to juror information.

II.

THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS TO THE NAMES AND HOME ADDRESSES OF JURORS. IN ANY EVENT, ANY SUCH RIGHT OF ACCESS IS SUBJECT TO REASONABLE RESTRICTIONS, SUCH AS THOSE IMPOSED BY SECTION 509(a) OF THE NEW YORK JUDICIARY LAW.

Even if the Court of Appeals' decision somehow can be read as having determined the merits of petitioner's First Amendment claim, the petition for certiorari should not be granted because there is no First Amendment right to the names and home addresses of jurors and because any such right is subject to reasonable regulation.

A. There Is No First Amendment Right Of Access To Jurors' Names And Home Addresses

The Supreme Court cases recognizing a First Amendment right of access all have dealt with actual physical access to court proceedings. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (access to criminal trial); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) (right to attend juror *voir dire*); *Press-Enterprise Co.* v. *Superior Court*, ____ U.S. ____, 106 S. Ct. 2735 (1986) (access to preliminary hearing). *See also United States* v. *Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984) (First Amendment right of access is limited to physical presence at trial). *Accord United States* v. *Beckham*, 789 F.2d 401, 406-409 (6th Cir. 1986); *United States* v. *Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983).

Although some federal courts have extended the reasoning of the Supreme Court cases on access to court proceedings to find a right of access to various documents filed with the court in connection with a judicial proceeding, no federal Court of Appeals has held that the First Amendment right of access to criminal proceedings requires disclosure of jurors' names and home addresses.[3] The only circuit court that has directly addressed the constitutional issue has concluded that there is no such right of access to jurors' names and home addresses. Thus, in *United States* v. *Gurney*, 558 F.2d 1202 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978), the Fifth Circuit held that the trial judge properly followed "a well-established practice" by refusing to allow public disclosure of a jury list that included jurors' names and addresses. 558 F.2d at 1210, n. 12. Just last year, in *United States* v. *Edwards*, 823 F.2d 111, 120 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1109 (1988), the Fifth Circuit reaffirmed the trial court's right to withhold the release of jurors' names, noting that no Supreme Court case since 1977 had overruled its holding in *Gurney*.

While petitioner asserts that juror interviews made possible by media access to jurors' names and home addresses have become an integral part of media coverage of a criminal trial (Petition, at 10-11), the courts have rejected attempts to parlay the First Amendment right of access to criminal trials into a generalized right to gather information. In *Radio & Television News Ass'n* v. *U.S. District Court*, 781 F.2d 1443 (9th Cir. 1986), petitioner claimed that the district court's order prohibiting trial counsel from communicating with the media violated petition-

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3 Contrary to the suggestion at page 9 of the Petition, the Fourth Circuit's decision in *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988), finding a right of access to jurors' names and home addresses, was not based on the First Amendment. 841 F.2d at 75-76, n. 4. Although the District Court of Massachusetts held in *United States* v. *Doherty*, 14 Media L. Rep. (BNA) 1406 (D. Mass. 1987), that there is a First Amendment right to the names and addresses of jurors at some reasonable time after a verdict is delivered, it stressed that this right is qualified and is subject to time and scope limitations. 14 Media L. Rep. at 1409-1410.

er's First Amendment rights. The Ninth Circuit rejected this argument, saying:

> [T]he impact on the media in this case is significantly different from situations where the media is denied access to a criminal trial or is restricted in disseminating any information it obtains.
>
> * * *
>
> [Petitioner] asserts a first amendment right of full access to trial participants. This assertion is not supported by constitutional case law.
>
> The press does enjoy a constitutional interest in access to our criminal courts and criminal justice process. In *Richmond Newspapers*, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827, 65 L.Ed.2d 973 (1980) (plurality) the Supreme Court affirmed the first amendment "right of access" or "right to gather information" granted to the press with respect to criminal trials. However, the Court described that right only as a right to sit, listen, watch, and report.
>
> * * *
>
> The media never has any guarantee of or "right" to interview counsel in a criminal trial. Trial counsel are, of course, free to refuse interviews, whether or not restrained by court order. If such an individual refuses an interview, the media has no recourse to relief based upon the first amendment.

781 F.2d at 1446-1447 (citations omitted). In *KPNX Broadcasting Co.* v. *Superior Court*, 139 Ariz. 246, 256, 678 P.2d 431, 441 (Ariz. 1984), the Arizona Supreme Court similarly held that the policies underlying the right of access to criminal trials do not guarantee the media access to trial participants.

The caselaw does not support petitioner's assertion that it has a constitutional right to disclosure of jurors' names and home addresses. Thus, even assuming that the Court of Appeals decided the constitutional issue adversely to petitioner, there is no

split of opinion among the circuit courts warranting review by this Court.

B. Any First Amendment Right Of Access To Jurors' Names And Home Addresses Is Subject To Reasonable Regulation

Assuming, for the sake of argument, that there is a First Amendment right of access to jurors' names and home addresses, any such right nevertheless is subject to reasonable regulation. Because section 509(a) of the New York Judiciary Law merely regulates the manner in which juror information is disclosed, and does not deny access to such information, it does not run afoul of the First Amendment.

The Supreme Court cases recognizing a constitutional right of access to criminal proceedings have acknowledged that limitations on the right of access that resemble "time, place and manner" restrictions on protected speech need not be justified by the compelling governmental interest necessary[4] to support an outright denial of access. *See Press Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 511, n. 10 (1984); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 607, n. 17 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 581-582, n. 18 (plurality opinion); *id.* at 598, n. 23 (Brennan, J., concurring); *id.* at 600 (Stewart, J., concurring). *See also Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 36 (1984) (because right to pretrial discovery is a matter of legislative grace, State discovery rules providing for protective orders require no heightened First Amendment scrutiny).

Where neither the purpose of a limitation on access nor its effect primarily is to deny access to information, the relevant standard for judging the constitutionality of such limitation is whether the restrictions imposed are reasonable and whether the State's interests override the limited incidental effects on First Amendment rights. *See United States* v. *Kerley*, 753 F.2d

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4 Although not subject to this standard, it is significant that the New York courts have found that compelling policy considerations underlie section 509(a). *See Newsday, Inc.* v. *Sise*, 120 A.D.2d at 13, 507 N.Y.S.2d at 184-185; 71 N.Y.2d at 151, 524 N.Y.S.2d at 38, 518 N.E.2d at 932.

617, 620-621 (7th Cir. 1985); *United States* v. *Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983), *cert. denied*, 461 U.S. 931 (1983); *KPNX Broadcasting Co.* v. *Superior Court*, 139 Ariz. 246, 256, 678 P.2d 431, 441 (Ariz. 1984). Under this standard, section 509(a), which simply provides that an application for disclosure of juror information must be made to the Appellate Division, clearly passes constitutional muster. There accordingly is no reason to grant certiorari to review the constitutionality of section 509(a).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Newsday, Inc. submits this reply brief in further support of its petition for a writ of certiorari.

Several of Respondents' arguments are worthy of brief rejoinder.

First, Respondents claim that the New York Court of Appeals "offered no view whatsoever whether" Newsday had a

constitutional right of access to juror names and addresses. Brief in Opposition at 7. This claim is transparently false. The Court of Appeals said

> We also reject petitioner's assertion that it is entitled to the jurors' names and addresses under the public's constitutional right of access to criminal proceedings . . . . Inasmuch as petitioner has not contended that it has been denied access to any judicial proceedings or to any transcripts of any proceedings, petitioner's constitutional right of access has not been violated.

Newsday, Inc. v. *Sise*, 71 N.Y.2d 145, 154 n.4, 524 N.Y.S.2d 35, 39 n.4, 518 N. E.2d 930, 933 n.4 (1987). Even if Respondents were correct and the Court of Appeals had ignored the constitutional question, it is difficult to see how this strengthens Respondents' hand: failure to consider the issue would equally affront Newsday's First Amendment rights.

Second, Respondents apparently contend that N.Y. Judiciary Law § 509(a) is a legislatively enacted vehicle for allowing Newsday to vindicate its First Amendment right of access to juror names and addresses. Brief in Opposition at 7-8, 11-12. Respondents make this claim despite the fact that

- The statute became effective in 1978, prior to the decisions of this Court which established the First Amendment right of access;
- The statute articulates *no* standard for the release of juror names and addresses, much less a standard congruent to the one enunciated by this Court for access to criminal proceedings;
- The Court of Appeals, far from directing the Appellate Division to use § 509(a) to protect the public's First Amendment right of access, Brief in Opposition at 7, rejected Newsday's claim of a First Amendment right; and

— The Court of Appeals decision forces the public to resort to a statute which "categorically prohibit[s]" disclosure of juror names and addresses, 71 N.Y.2d at 153, 524 N.Y.S.2d at 39, 518 N. E.2d at 933.

With respect to § 509(a), the most that Respondents can promise is that the Appellate Division "may" apply a "First Amendment balancing test." Brief in Opposition at 7. Respondents, of course, are in no position to keep that promise. Indeed, the Appellate Division will be bound to follow the holding of the Court of Appeals that there is no constitutional right of access to the records Newsday seeks. Thus, even if Newsday were to apply to the Appellate Division for access, the Court of Appeals' decision effectively precludes any counterweight to balance against § 509(a)'s prohibition on access.

Third, the First Amendment right of access to the criminal judicial process, as Respondents concede, has been extended beyond mere attendance at court proceedings. Brief in Opposition at 9; *see* Petition at 8-10 (citing and discussing cases). It is clear that this Court intended its decisions in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982), *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"), and *Press-Enterprise Co.* v. *Superior Court*, ____ U.S. ____, 106 S.Ct. 2735 (1986) ("*Press-Enterprise II*") to have this broader application. This Court's decisions have turned not on whether access was sought to a "judicial proceeding" or to "transcripts of proceedings" but rather on whether access to the particular process advances the First Amendment interest of an informed public discussion and understanding of the criminal process. *See, e.g. Globe Newspaper*, 457 U.S. at 604-05; *Press-Enterprise I*, 464 U.S. at 516 (Stevens, J., concurring) ("[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues"). One circuit court and two district courts, following this Court's clear signal, have afforded a

right of access to juror names and addresses.[1] *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988)[2]; *United States* v. *Doherty*, 675 F.Supp 719, 14 Media L. Rep. (BNA) 1407 (D.C. Mass. 1987); *In re New York Times Co.*, Misc. No. 82-0124 (D.D.C. June 19, 1982). The issue is surely ripe for this Court's plenary consideration.

Fourth, respondents do not—and cannot—deny that the identities of jurors have traditionally been available and that information obtained through access to jurors plays a significant positive role in the functioning of the judicial process and the government as a whole. *See* Petition at 12-18. Access to jurors not only helps to inform the public; it helps to shape public debate on important legal and political issues. Plenary review is required to vindicate Newsday's important First Amendment rights.

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1 Respondents rely on language in *Radio & Television News Ass'n.* v. *U.S. District Court*, 781 F.2d 1443 (9th Cir. 1986) ("RTNA"), to support their assertion that the First Amendment right does not extend beyond the right to attend court proceedings. RTNA, unlike the present case, involved a gag order imposed *during* a criminal trial to avoid prejudicing defendants' fair trial right. *Cf. Capital Cities Media, Inc.* v. *Toole*, 463 U.S. 1303, 1306 (1983) (opinion in chambers) ("Insofar as the State's interest is in shielding jurors from pressure during the course of the trial, so as to ensure the defendant a fair trial, that interest becomes attenuated after the jury brings in its verdict and is discharged"). In addition, Respondents' position wholly ignores the decisions (1) holding that the First Amendment right applies to materials and information other than judicial proceedings, *see* Petition at 8-9; (2) striking down restrictions on the right of the media to interview jurors after a verdict has been rendered, *see, e.g.*, *Journal Pub. Co.* v. *Mechem*, 801 F.2d 1233 (10th Cir. 1986); *United States* v. *Sherman*, 581 F.2d 1358 (9th Cir. 1978); and (3) specifically recognizing a First Amendment right of access to juror names and addresses.

2 While the Fourth Circuit, almost as an afterthought, disclaimed making a First Amendment determination, 841 F.2d at 75 n.4, it expressly relied on this Court's decisions in *Press-Enterprise I* and *Press-Enterprise II* and, indeed, ventured that the Fifth Circuit, the only circuit to deny access to juror names and addresses, would reconsider its decision in light of the *Press-Enterprise* decisions. *In re Baltimore Sun*, 841 F.2d at 76.

Conclusion

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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